M SENTIVELU R MARIMUTHU

v.

PUBLIC SERVICES COMMISSION MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RAHMAH HUSSAIN JCA
VINCENT NG J
[CIVIL APPEAL NO: W-01-37-1997]
11 JULY 2005

ADMINISTRATIVE LAW: *Public servants - Dismissal of public officer - Seven year delay in charging public officer with misconduct - Whether such delay procedurally unfair - Whether such delay evidenced condonation on part of employer of employee's misconduct*

ADMINISTRATIVE LAW: *Public servants - Disciplinary proceedings - Procedural fairness - Public officer charged with misconduct merely given opportunity to make written representations in answer to charges - Public officer not granted oral hearing - Public officer failing to ask for such oral hearing - Whether fair of disciplinary authority to merely grant public officer opportunity to make written representations - Whether public officer ought to have been given opportunity to be heard orally notwithstanding his failure to ask for oral hearing - Tests for determining whether procedure fair - Reasons for oral hearing*

In 1984, disciplinary proceedings were commenced against the appellant in respect of misconduct allegedly committed by him in 1977. The appellant was not granted an oral hearing nor did he ask for one. He merely made written representations in answer to the charges of misconduct. He was subsequently dismissed and informed of his dismissal by a letter dated 9 July 1985. In 1986, the appellant sued inter alia to declare his dismissal unlawful and of no effect. In the High Court, the appellant complained of the inordinate delay (seven years) on the part of the respondents in bringing the charges against him. The High Court however held that the question of delay did not arise since there was nothing in the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 to require disciplinary action to be taken within a specified time. Further, the High Court did not consider the effect of the disciplinary authority's failure to grant the appellant an opportunity to be heard orally, notwithstanding the appellant's own failure to ask for an oral hearing. The appellant appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The fact that the General Orders do not prescribe a time limit does not mean that a disciplinary hearing in respect of charges of misconduct brought no matter how long after the event may be upheld as being procedurally fair. It depends on the facts of each case as well as on a number of factors such as the nature of the charge, the length of the delay and the reason for the delay, and the opportunity for the employee to meet the accusation against him. In the absence of any reasonable explanation, the longer the delay the more difficult it would be for the disciplining body to justify the proceedings against the employee. Long delay coupled with other circumstances may amount to strong evidence of condonation on the part of the employer of the employee's misconduct. *Azman bin Abdullah v. Ketua Polis Negara* [1997] 1 CLJ 257 (folld); *McCalla v. Disciplinary Committee of the General Legal Council* [1999] 1 LRC 195 (folld). (pp 783 h & 784 a-b)

[2] Ordinarily it is sufficient to grant an employee the opportunity to make written representations in answer to the charges of misconduct made against him. However, there may be circumstances where the failure to hold an oral hearing may be procedurally unfair. The content of procedural fairness is flexible according to particular facts and circumstances. In determining whether a particular procedure is fair, the court must place itself in the shoes of the decision-maker. *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333 (refd); *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619 (folld); *Kioa v. West* [1985] 159 CLR 550 (folld); *Canada (Minister of Citizenship and Immigration)* [1999] 174 DLR (4th) 193 (folld); *Lloyd v. McMahon* [1987] AC 625 (refd). (p 786 a-b, g)

[3] In the instant case it was not sufficiently fair of the disciplinary authority to merely have granted the appellant an opportunity to make written representations. The appellant ought to have been given an opportunity to be heard orally notwithstanding the fact that he did not ask for an oral hearing. The charge brought against the appellant was serious. The case was one in which the police had investigated and decided not to proceed. If an oral hearing had been conducted, the appellant would have been entitled to use the witness statements recorded by the police to defend himself. The appellant had also, in his written representations, exculpated himself on facts that called for testing by way of cross-examination. (pp 790 e-h & 791 a)

[4] The principle that it is for a person accused of a disciplinary offence to ask for an oral hearing originated in England before the coming into force of the Human Rights Act 1998 in 2000. Caution must be exercised when importing English human rights principles before the coming into force of the Human Rights Act 1998. Having regard to the different socio-economic circumstances in Malaysia, greater flexibility should be accommodated in favour of a person accused of a disciplinary offence. (p 791 a-c)

Obiter:

[1] The law is not static and latter learning may often demonstrate the harshness of previous common law principles. In such circumstances judges should not be inhibited in their approach by blinkered vision. Judges must be spirits bold enough to change a stance earlier taken. (p 791 d-e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada tahun 1984, satu prosiding disiplin telah diambil terhadap perayu berkaitan dakwaan salah laku yang dikatakan dilakukan olehnya pada tahun 1977. Perayu tidak diberi peluang untuk didengar secara lisan dan tidak juga memohon untuk pendengaran sedemikian. Sebaliknya, perayu telah menulis representasi bagi menjawab tuduhan salah laku tersebut. Perayu kemudian di buang kerja dan diberitahu mengenainya melalui surat bertarikh 9 Julai 1985. Pada tahun 1986, perayu memulakan dakwaan antara lain bagi mengisytiharkan pembuangan kerjanya sebagai batal dan tak sah. Di Mahkamah Tinggi, perayu berhujah tentang kelengahan melampau (7 tahun) responden dalam mengemukakan tuduhan terhadapnya. Mahkamah Tinggi bagaimanapun mendapati bahawa soal lengah tidak berbangkit oleh kerana tiada apa-apa pun di dalam Perintah Am, Bahagian D yang memerlukan tindakan disiplin diambil dalam tempoh-tempoh tertentu. Mahkamah Tinggi juga tidak menimbang kesan-kesan yang mungkin timbul atas kegagalan pihak berkuasa disiplin memberikan peluang kepada perayu untuk didengar secara lisan, walaupun perayu sendiri tidak memohon untuk itu. Perayu merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Gopal Sri Ram HMR:

[1] Fakta bahawa Perintah Am Bahagian D tidak menetapkan had masa tidak bermakna bahawa suatu pendengaran disiplin atas dakwaan salah laku boleh dibuat pada bila-bila masa tanpa mengira tempoh masa yang berlalu antara tarikh berlakunya salah laku dan tarikh pertuduhan dibuat. Ianya bergantung kepada fakta sesuatu kes serta faktor-faktor lain seperti jenis pertuduhan, tempoh kelengahan, sebab-sebab kelengahan serta peluang yang diberi kepada pekerja untuk menjawab tuduhan-tuduhan. Dalam ketiadaan

apa-apa penjelasan yang munasabah, lebih panjang tempoh kelengahan bererti lebih sukar bagi pihak berkuasan disiplin untuk menjustifikasikan prosiding terhadap pekerja. Kelengahan yang panjang, dicampur dengan faktor-faktor lain, boleh membangkitkan keterangan kukuh tentang penerimaan oleh majikan akan salah laku pekerja tersebut. *Azman bin Abdullah v. Ketua Polis Negara* [1997] 1 MLJ 263 (diikuti); *McCalla v. Disciplinary Committee of the General Legal Council* [1999] 1 LRC 195 (diikuti).

[2] Pada kebiasaannya adalah mencukupi jika seseorang pekerja diberikan peluang untuk membuat representasi bertulis bagi menjawab tuduhan-tuduhan salah laku terhadapnya. Bagaimanapun, keadaan mungkin wujud di mana kegagalan memberi peluang pendengaran lisan boleh menyebabkan ketidakadilan prosedur. Kandungan keadilan prosedur adalah fleksibel mengikut suasana dan halkeadaan sesuatu kes. Dalam menentukan sama ada sesuatu prosedur itu adil atau tidak, mahkamah harus meletakkan dirinya di tempat pembuat keputusan yang berkenaan. (lihat *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333 (dirujuk); *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619 (diikuti); *Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193 (diikuti); *Lloyd v. Mcmahon* [1987] AC 625 (dirujuk).

[3] Dalam kes semasa, agak tidak adil bagi jawatankuasa disiplin memberikan perayu peluang hanya untuk membuat representasi bertulis. Perayu sepatutnya diberikan peluang untuk didengar secara lisan. Pertuduhan yang dikenakan ke atas perayu adalah pertuduhan yang serius. Ia adalah satu kes yang telah disiasat oleh polis tetapi tidak diteruskan dengan pendakwaan. Sekiranya pendengaran lisan dilaksanakan, perayu berpeluang untuk menggunakan kenyataan-kenyataan saksi yang direkod oleh polis untuk mempertahankan dirinya. Perayu juga, dalam representasi bertulisnya, telah menyatakan ketidakbersalahannya di atas fakta, yang mana ini perlu diuji melalui pemeriksaan balas.

[4] Prinsip bahawa sesuatu pendengaran lisan itu harus dipohon oleh orang yang dituduh melakukan kesalahan disiplin berasal dari England, iaitu sebelum Akta Hak Asasi Manusia 1998 dikuatkuasakan pada tahun 2000. Apapun, kita harus berhati-hati apabila melaksanakan prinsip hak asasi manusia Inggeris yang terpakai sebelum berkuatkuasanya Akta Hak Asasi Manusia Inggeris 1998. Mengambilkira keadaan sosio-ekonomi yang berbeza di Malaysia, keanjalan lebih luas harus diberi kepada orang yang dituduh melakukan kesalahan disiplin di sini.

Obiter

[1] Undang-undang bukanlah sesuatu yang kaku dan keilmuan mendatang mungkin menyerlahkan kekasaran prinsip common law yang terdahulu. Dalam keadaan sedemikian, hakim-hakim, dalam mengambil pendekatan mereka, tidak harus dikekang oleh visi yang kabur. Hakim-hakim harus mempunyai keberanian untuk mengubah pandangan-pandangan lalu yang diambil oleh mereka.

Case(s) referred to:

Apparao v. Suryaprakasa AIR [1951] M 664 ***(refd)***

Azman Abdullah v. Ketua Polis Negara [1997] 1 CLJ 257 CA ***(foll)***

Baker v. Canada (Minister of Citizenship and Immigration) [1999] 174 DLR (4th) 193 ***(refd)***

Bong Nyi Moi v. Narayanasamy [1973] 1 MLJ 250 ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Kioa v. West [1985] 159 CLR 550 ***(foll)***

Lloyd v. McMahon [1987] AC 625 ***(refd)***

Mahabirji v. Prem AIR [1965] All 494 ***(refd)***

McCalla v. Disciplinary Committee of the General Legal Council [1999] 1 LRC 195 ***(foll)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 42

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co

For the respondents - Mahamad Nasir Disa SFC

[Appeal from High Court, Kuala Lumpur; Civil No: F21-1220-1986]

*[**Editor's note:** Although the appellant succeeded in declaring his dismissal void and obtained an order for an enquiry into his emoluments, his claim for damages was refused – see p 791 para g-h.*

The Human Rights Act 1998 was enacted by the UK Parliament to make the European Convention on Human Rights ('the Convention') part of the national or domestic law of all parts of the United Kingdom. The Act created domestic law rights corresponding to rights arising under the Convention. The UK courts and tribunals have now to read and give effect to any laws they are considering in a manner compatible with the rights under the Act. The Act is very wide in scope and in effect. In order to appreciate what rights are covered by the Act, reference may be made to cases taken to the European Court of Human Rights. See for instance Hussain v. The United Kingdom [1996] ECHR 8; Singh v. The United Kingdom [1996] ECHR 9; Robins v.

The United Kingdom [1997] ECHR 72; Coyne v. The United Kingdom [1997] ECHR 73; Hutchison Reid v. The United Kingdom [2003] ECHR 94; BB v. The United Kingdom [2004] ECHR 64.]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:

The appellant in this case was a clerk in the Postal Department. As long ago as 18 October 1984, disciplinary proceedings were commenced against him in respect of misconduct allegedly committed by him between January and May 1977. At the conclusion of those proceedings the appellant was dismissed from service and the decision to dismiss him was communicated to him by way of a letter dated 9 July 1985. The appellant instituted an action in November 1986 against the instant respondents seeking, *inter alia*, a declaration that his dismissal was unlawful and of no effect. The action came on for hearing on 12 August 1994. Since there was no dispute about the facts, the learned judge, with the consent of the parties quite correctly dispensed with the calling of witnesses. He then directed that counsel put in written submissions and in a reserved judgment dismissed the appellant's claim. It is against that decision that the present appeal has been brought.

Before us the only point relied on by learned counsel is that his client was deprived of procedural fairness because of the seven year delay on the part of the respondents in bringing the charges against the appellant. The learned judge resolved that issue against the appellant. This is what he said:

> In the written submission the Plaintiff contended that there has been an inordinate delay in the decision making process. The Plaintiff in his written submission said, 'The issue which is fundamental to the Plaintiff's case is in relation to the stale charges and the delay of about seven years for the PSC to have delivered its decision.'
>
> With respect I can find nowhere in Chapter 'D' 1980 which requires a disciplinary action to be taken within a specified time. The question of delay does not arise. It is not the function of the Court to supplement the legislation even if the legislative provision is not as full and complete as the Court might think appropriate. (See *Ghazi bin Mohd. Sawi v. Mohd. Haniff bin Omar, Ketua Polis Negara* [1994] 2 MLJ 114).

With respect, I am unable to agree with the learned judge. In my judgment, the fact that the General Orders Cap 'D' does not prescribe a time limit does not mean that a disciplinary hearing in respect of charges of misconduct brought no matter how long after the event may be upheld as being procedurally fair. It all depends on the facts of each case. In particular it depends on a number of factors including, the nature of the charge, the length of the delay, the

reasons for the delay the opportunity which the employee had to evidentially meet the accusation levelled at him. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct. See, *Azman bin Abdullah v. Ketua Polis Negara* [1997] 1 CLJ 257. Further, in *McCalla v. Dsiciplinary Committee of the General Legal Council* [1999] 1 LRC 195 the Board of the Privy Council unanimously upheld the common law power in a court to stay proceedings which had been delayed in their institution thereby occasioning substantial prejudice to the accused person. Lord Hutton who delivered the advice of the majority said:

> Their Lordships are of the opinion that the Supreme Court and the Court of Appeal were right to hold that there is power under the common law to stay proceedings where there has been such delay in bringing a charge or complaint before a court or tribunal that a hearing of the matter would be likely to result in substantial prejudice to the person against whom the charge or complaint is brought. In *Bell v. Director of Public Prosecutions* [1985] AC 937, [1985] 2 All ER 585 at p 950C of the former report Lord Templeman stated:
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> > Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In *Connelly v. Director of Public Prosecutions* [1964] AC 1254, 1347, Lord Devlin rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion:
> >
> > > the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.

> Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay.

After a full examination of the history of the matter both the Supreme Court and the Court of Appeal concluded that the appellant had not been substantially prejudiced by the delay and refused to grant an order prohibiting the Committee from hearing the complaint.

In *McCalla*, the difference between the majority and the minority was upon the question whether on the particular facts there had been any substantial prejudice. The majority took the view that on the facts of that case the delay of two years between the issue of the complaint and the notice of the intended hearing had occasioned substantial prejudice to the fair hearing of one of the complaints against the appellant McCalla. The minority took the opposite view.

In *Azman bin Abdullah v. Ketua Polis Negara* there was a delay of about between two to five years between the commission of the several acts of misconduct and the holding of the inquiry. This court made no adverse comment upon the effect of the delay probably because the appellant had been given a full oral hearing which was held over two days. Additionally, the appellant there had pleaded guilty to the first and second charges. Accordingly, the appellant's complaint that there had been procedural unfairness was rejected. Dealing with the point, Abdul Malek Ahmad JCA (now PCA) said this:

> In our case, the actual hearing took two days and it would be quite absurd to imagine that during that period of time the appellant was not given a chance to cross-examine his opponent's witnesses or to state his case either orally or in writing. In *De Smith's Judicial Review of Administrative Action* at pp 2000-2001, it is stated:
>
> > What the *audi alteram partem* rule guarantees is an adequate opportunity to appear and be heard (subject to the proviso that in some situations prior notice may be valid although not in fact received). The rule does not guarantee that a hearing or inspection shall never proceed or that action shall never be taken to a person's detriment unless everyone entitled to appear does in fact appear. There are indeed situations in which it will normally be unjust to proceed with a hearing in the absence of a person liable to sustain serious detriment by the outcome; but it may still be justifiable in such situations to proceed if that person has absented himself without reasonable cause. Clearly, it will not be justifiable to proceed if the time or place fixed for a hearing is such that an interested party cannot reasonably be expected to attend, or (if he attends) to be able to prepare his case properly.
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> On these considerations, this ground fails.

In the present instance the appellant was granted an opportunity to make written representations in answer to the charges of misconduct made against him. Ordinarily this is sufficient. See, *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333. But there may be circumstances where the failure to hold an oral hearing may be procedurally unfair. It is well settled that the content of procedural fairness is flexible according to particular facts and circumstances and this was recognised by this court in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619 where we said:

> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed. (See *R v. Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602; [1977]1 WLR 795).
>
> The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise according to its own facts. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources: but in the final analysis, it is a question that is to be decided according to the Malaysian concept of fairness.

De Smith, Woolf and Jowell in the 7th edn of their classic work "*Judicial Review of Administrative Action*" states the content of procedural fairness as follows:

> The content of fair procedures is therefore infinitely flexible. It ranges from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully fledged hearing at the other extreme with most of the characteristics of a judicial trial. What is required in any particular case is incapable of definition in abstract terms.

It is also an established principle that in determining whether a particular procedure is fair, the court must place itself in the shoes of the decision-maker. Thus in *Kioa v. West* [1985] 159 CLR 550 Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As *the obligation to observe the principles of natural justice* is not correlative to a common law right but *is a condition governing the exercise of a statutory power*, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. *When the question for the court is whether the condition is satisfied, the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.* A different approach is called for when the question is whether a jurisdictional fact existed at the relevant time: jurisdiction may depend not on the circumstances perceived by the repository of the power but on the objective existence of the fact at the relevant time. (emphasis added.)

This statement of principle by Brennan J is of first importance. For, it recognises the dichotomy between review on grounds of procedural fairness and review on grounds of the pre-existence of jurisdictional facts. The former calls for the application of a subjective test but the latter an objective test.

That the content of procedural fairness is flexible has been recognised by the Supreme Court of Canada. L'Heureux-Dubé J in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 174 DLR (4th) 193, set out some of the criteria which determine whether a procedure adopted in a given case is fair. In a passage that is of considerable importance he said:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, (*The Board of Education of the Indian Head School v. Knight* [1990] 1 SCR

653) at p. 683, it was held that 'the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making'. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191 (*Old St. Boniface Residents Assn. Inc. v. Winnipeg* (City [1990] 3 SCR 1170).

A second factor is the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates': *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see DJ M Brown and JM Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J (as he then was) in *Kane v. Board of Governors of the University of British Columbia* [1980] 1 SCR 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake ... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J (now Sedley LJ) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651 (QB), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All ER 66, [1964] AC 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.'

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; Reference *re Canada Assistance Plan (B.C.)* [1991] 2 SCR 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* [1995] 33 Imm. LR (2d) 57 (FCTD); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* [1995] 98 FTR 36; *Bendahmane v. Canada (Minister of Employment and Immigration)* [1989] 3 FC 16 (CA). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: DJ Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, *'Legitimate Expectation and its Application to Canadian Immigration Law'* [1992] 8 JL & Social Pol'y 282, at p. 297; C*anada (Attorney General) v. Human Rights Tribunal Panel (Canada)* [1994] 76 FTR 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 SCR 282, per Gonthier J.

I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the

> individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

In the present case, the appellant was not granted an oral hearing. Neither did he ask for one. It appears well settled that the general rule is that it is for the person adversely affected by a decision to request for an oral hearing. If such a request is denied then there may be grounds for complaint. Thus, in *Lloyd v. McMahon* [1987] AC 625 you find Lord Bridge saying this:

> If any councillor had wanted to put forward his own independent and individual grounds in rebuttal of the charge of wilful misconduct against himself, I have no doubt he would have done so. If any had asked to be heard orally and the auditor had refused, there would have been clear ground for a complaint of unfairness.

And in the same case Lord Templeman said:

> Mr. Blom-Cooper, who appeared for the appellants, urged that the auditor should have invited the appellants to make oral representations before he reached the decision based on the written material. **If any appellant had requested an oral hearing,** I think that it would have been desirable for the auditor to have granted that request … (emphasis added.)

Bearing in mind the principles stated in the foregoing authorities, the question I must ask – which is the question the learned judge, with respect, failed to ask himself – is this: placing myself, as I do, in the shoes of the disciplinary authority in this case, was it sufficiently fair to the appellant to have granted him an opportunity to make written representations or ought he to have been given an opportunity to be heard orally notwithstanding that he did not ask for an oral hearing? After anxious consideration, I am driven to say that that question must be answered in the appellant's favour. And I will explain why this must be so on the peculiar facts of this case.

The charge brought against the appellant was serious in nature. Further, this is a case in which the police had conducted investigations and decided not to proceed. If a proper oral hearing had been conducted, the appellant would have been entitled to use the witness statements recorded by the police to defend himself. Such statements are not privileged from disclosure in civil proceedings (*Bong Nyi Moi v. Narayanasamy* [1973] 1 MLJ 250) nor in criminal proceedings (*Apparao v. Suryaprakasa* AIR [1951] M 664; *Mahabirji v. Prem* AIR 1965 All 494). Lastly, the appellant had, in his written representation, exculpated himself based on facts that called for testing by way of cross examination. He had also said that because he had heard nothing for a long

time, he assumed that no action would be taken against him. Since they were the authors of the long delay, the respondents as a reasonable tribunal should have afforded the appellant an oral hearing. It is true that the appellant did not ask to be heard orally. But if you look at the principle that it is for a person accused of a disciplinary offence to ask for an oral hearing, you will find that it finds its origins in England before the coming into force in 2000 of the Human Rights Act 1998. Further, English citizens are far more conscious of their civil liberties and rights and England has a legal aid framework far more advanced than that in this country. Caution must therefore be exercised when we import an English principle governing human rights before the coming into force of the Human Rights Act in that country. By contrast, we have had, since Merdeka, a dynamic Federal Constitution which protects a person's basic human rights. Also, the vast majority of our citizens are not fully conscious of their human rights. And they lack a well constructed legally aid system. The fear of being mulcted in costs, if unsuccessful, keeps them away from litigation. Hence, having regard to the differently socio-economic circumstances in this country, greater flexibility should be accommodated in favour of a person accused of a disciplinary offence. The law is not static and latter learning may often demonstrate the harshness of previous common law principles. In those circumstances we the judges should not be inhibited in our approach by blinkered vision. We must be spirits bold enough to change a stance earlier taken. It is important to remind ourselves of what Dickson J (later CJ) said in *Kane v. Board of Governors of the University of British Columbia* already quoted above:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.

There is this further point. If the delay of two years caused McCalla substantial prejudice in respect of the plagiarism charge against him, the seven year delay in this case has indeed caused the appellant substantial prejudice especially in the absence of an oral hearing.

For the reasons already given, this appeal must succeed. The orders made by the High Court are set aside. In prayer 1 of his statement of claim the plaintiff has sought a declaration which in substance declares that his dismissal is void. The plaintiff shall have a decree in the terms of prayer 1. He shall also have the order for an inquiry into his emoluments as claimed in prayer 2 of the statement of claim. Such inquiry shall be conducted before the senior assistant registrar of the High Court. His claim for damages is refused. The costs of this appeal and those in the court below shall be borne by the respondents.

My learned brother Vincent Ng Kim Khoay, J has seen this judgment in draft and has expressed his agreement with it.

I must add by way of postscript that this appeal was heard by a Bench of this Court which included my learned sister Rahmah bte Hussein, JCA who has since retired. This judgment is accordingly delivered pursuant to s. 42 of the Courts of Judicature Act 1964, as amended.